



California Fair Political Practices Commission

October 10, 1989

Victor J. Kaleta
City Attorney
City of Pasadena
100 North Garfield Avenue
Pasadena, CA 91109

Re: Your Request for Advice
Our File No. A-89-496

Dear Mr. Kaleta:

You have requested advice on behalf of Ms. Inna Babbit concerning application of the conflict-of-interest provisions of the Political Reform Act (the "Act")¹ to her duties as an employee of the Pasadena Water and Power Department. The following advice is based upon the facts provided in your letter, my September 15, 1989 telephone conversation with Scott Rasmussen and Susan Nielsen, and my September 21, 1989 telephone conversation with Susan Nielsen.

QUESTIONS

1. Is Ms. Babbit's testing of water samples considered participating in a governmental decision under the Act?
2. If the testing is considered participating in a governmental decision, does Ms. Babbit have a conflict of interest if the company providing water treatment employs her husband?

CONCLUSIONS

1. Based on the facts provided, Ms. Babbit uses objective and standardized scientific procedures when she tests and analyzes water samples. Since her test analyses and reports do not require the exercise of judgment, Ms. Babbit is not participating in a governmental decision.

¹ Government Code Sections 81000-91015. All statutory references are to the Government Code unless otherwise indicated. Commission regulations appear at 2 California Code of Regulations Section 18000, et seq. All references to regulations are to Title 2, Division 6 of the California Code of Regulations.

2. Since the water testing is not considered participating in a governmental decision, the disqualification provisions of the Act do not apply.

FACTS

The Pasadena Water and Power Department ("department") is issuing a request for proposals ("RFP") to potential bidders. The RFP will request bids to provide a temporary drinking water treatment plant. The plant consists of water tanks in which water is treated by filtration through granular activated carbon. The department will lease this equipment and the contractor will provide the operation, maintenance and labor involved in setting up and removing the plant at the conclusion of the two to three year term. The contract involves an annual payment of approximately \$400,000 by the department.

Ms. Babbit, the only chemist with the department's water division, is not a designated employee under the department's conflict of interest code. As the water division chemist, she is responsible for performing chemical analysis of water samples taken from various water sources in the city. With respect to the plant, Ms. Babbit will take water samples from the plant effluent and perform gas chromatography tests to determine the water's chemical composition. The gas chromatography test produces a chromatogram (line graph). By utilizing standardized specific scientific procedures, Ms. Babbit can translate the chromatogram into parts per billion of organic contaminants.

Ms. Babbit's test results are subject to review by the State Department of Health Services as part of its certification process of the city laboratory for the analysis of drinking water. The test results are also given to the department's project engineer, Ms. Susan Nielsen. Since Ms. Nielsen is not a chemist, she cannot interpret the graph results. Therefore, she accepts and uses Ms. Babbit's conclusions to determine if the plant effluent satisfactorily meets the RFP standards for water quality (i.e., whether contract performance is satisfactory). Although the contract has not been drafted yet, it will contain a damages clause, with a deduction in the payments to the contractor, if the water is not up to the proper standard.

Ms. Babbit only performs chemical analysis of the water and is not involved in any aspects of the contract. She does not draw up the RFP, negotiate with the bidders or the successful contractor, or prepare the contract.

Westates Carbon, a California corporation, is a potential bidder. Ms. Babbit's husband is employed as a chemical engineer by Westates. Although he does design engineering for carbon regeneration facilities, he will not be assigned to any work under the potential contract with the department. Westates is not a Fortune 500 company, is not listed on any stock exchange or

securities list, and does not meet any of the criteria for a business entity covered under Regulation 18702.2 subdivisions (a) through (f).

ANALYSIS

Participating in a governmental decision

Regulation 18700(a) defines "public official" to mean "every natural person who is a member, officer, employee or consultant of a state or local government agency." Pursuant to Regulation 18700(c), a public official "participates in the making of a governmental decision" when, acting within the authority of his or her position, he or she:

* * *

(2) Advises or makes recommendations to the decision-maker, either directly or without significant intervening substantive review, by:

(A) Conducting research or making any investigation which requires the exercise of judgment on the part of the official or designated employee and the purpose of which is to influence the decision; or

(B) Preparing or presenting any report, analysis or opinion, orally or in writing, which requires the exercise of judgment on the part of the official or designated employee and the purpose of which is to influence the decision.

In Ms. Nielsen's opinion, Ms. Babbit neither advises nor makes recommendations to her. Ms. Babbit's role is to perform gas chromatography tests to determine the water's chemical composition. These are objective tests, which produce a chromatogram or line graph. Ms. Babbit uses standard scientific procedures to translate the chromatogram; in essence, a specific chromatogram correlates to a specific contaminant level. She then informs the project engineer of the test results, which are expressed by a numerical level of contamination. Based on this information, the project engineer decides if the water is in compliance with the contract standards.

Under the Act, if Ms. Babbit prepares a report or analysis of the water samples, which requires the exercise of judgment, she is participating in a governmental decision. However, if she does not exercise her own judgment and merely uses objective and standardized scientific procedures, she is not participating in a governmental decision.

Based on the facts provided, Ms. Babbit uses objective and standardized scientific procedures when she tests and analyzes the water samples. Therefore, since her test analyses and reports do not require the exercise of judgment, Ms. Babbit is not participating in a governmental decision. Accordingly, the disqualification provisions of the Act do not apply.

I trust that this answers your questions. If you have any further questions regarding this matter, please contact me at (916) 322-5901.

Sincerely,

Kathryn E. Donovan
General Counsel

By: *W. R. Stecher*
Jill R. Stecher
Counsel, Legal Division

KED:JRS:plh

Enclosure

cc: Scott Rasmussen



ONE HUNDRED NORTH GARFIELD AVENUE

PASADENA, CALIFORNIA 91109

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OFFICE OF THE CITY ATTORNEY
ROOM 228, CITY HALL
PHONE (818) 405-4141

August 17, 1989

Kathryn Donovan, Chief Counsel
Fair Political Practices Commission
P.O. Box 907
Sacramento, California 95804-0807

Re: Request for Written Advice for Inna Babbit,
Pasadena Water & Power Department Chemist.

Dear Ms. Donovan:

This is a request for written advice for Inna Babbit pursuant to Government Code Section 83114(b) and 2 Cal. Admin. Code Section 18329.

FACTUAL BACKGROUND:

The Pasadena Water and Power Department ("department") is issuing a Request for Proposals ("RFP") to potential bidders. The RFP will request bids to provide a temporary drinking water treatment plant. The plant consists of a water tank in which water is treated by filtration through granular activated carbon. The department will lease this equipment and the contractor will provide operation and maintenance as well as the labor involved in setting up and removing the plant at the conclusion of the term. The contract will call for approximately a \$400,000 annual payment by the department.

A potential bidder is Westates Carbon, a California corporation. Westates is not a Fortune 500 company; is not listed on the New York or the American Stock Exchange; is not listed on the National Association of Securities Dealers National Market list; is not listed on the Pacific Stock Exchange; and does not have net tangible assets of at least \$4,000,000, pre-tax income for the last fiscal year of at least \$750,000 or net income from that period of at least \$400,000. Westates does not have net tangible assets of at least \$18,000,000 or pre-tax income for the last fiscal year in excess of \$2,500,000.

Westates has approximately 40 employees. One employee of Westates is Mr. Babbit, Inna Babbit's husband. Mr. Babbit has been employed by Westates for slightly under one year. His background is chemical engineering in research and development. He does design engineering for carbon regeneration facilities, to treat carbon of

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the type which would be used in the plant. Mr. Babbit would not be assigned to any work under the contract with the department.

Inna Babbit is an employee of the department. Her title is Chemist. Her job duty is to perform chemical analysis of water samples taken from various water sources in the City. With respect to the plant, she would, in her normal line of duty, accept water samples from the plant effluent and perform laboratory tests to determine its chemical composition. The standard test that she would use for this purpose is gas chromatography, which produces a line graph. She will interpret this graph and translate it into parts per billion of organic contaminants. Interpretation of gas Chromatograph results requires considerable skill and training in organic chemistry. She will give test results to the department's project engineer for determination of whether the plant effluent satisfactorily meets the standards called for by the RFP as to water quality (i.e., whether contract performance is satisfactory). The project engineer is not herself qualified to interpret the results from the graph and must accept Mrs. Babbit's conclusions. Mrs. Babbit's retains the graphs and test results, which are subject to review by the State Department of Health Services as part of its certification process of the City Laboratory for the analysis of drinking water. Mrs. Babbit has no job function with respect to the making of the contract (e.g., drawing up the RFP, negotiations with bidders and/or the successful contractor, or contract preparation and signing).

QUESTIONS PRESENTED:

1. Assuming the contract is awarded to Westates Carbon, is Inna Babbit's testing of water samples a governmental decision under the Political Reform Act?
2. If the testing is a governmental decision, will Inna Babbitt have a conflict of interest?
3. What action, if any, is appropriate?

If you require further facts to answer these questions, please contact Scott D. Rasmussen, Assistant General Counsel for the Water and Power Department, (818) 405-4157.

Very truly yours,



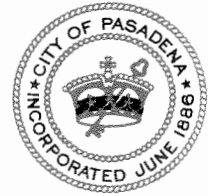
Victor J. Kaleta
City Attorney

cc: Scott D. Rasmussen

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ONE HUNDRED NORTH GARFIELD AVENUE
PASADENA, CALIFORNIA 91109

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OFFICE OF THE CITY ATTORNEY
ROOM 228, CITY HALL
PHONE (818) 405-4141

August 17, 1989

Kathryn Donovan, Chief Counsel
Fair Political Practices Commission
P.O. Box 907
Sacramento, California 95804-0807

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If you require further facts to answer these questions, please contact Scott D. Rasmussen, Assistant General Counsel for the Water and Power Department, (818) 405-4157.

Very truly yours,



Victor J. Kaleta
City Attorney

cc: Scott D. Rasmussen



California Fair Political Practices Commission

August 21, 1989

Victor J. Kaleta
Office of the City Attorney
Room 228, City Hall
100 North Garfield Avenue
Pasadena, CA 91109

Re: Letter No. 89-496

Dear Mr. Kaleta:

Your letter requesting advice under the Political Reform Act was received on August 21, 1989 by the Fair Political Practices Commission. If you have any questions about your advice request, you may contact Jill Stecher an attorney in the Legal Division, directly at (916) 322-5901.

We try to answer all advice requests promptly. Therefore, unless your request poses particularly complex legal questions, or more information is needed, you should expect a response within 21 working days if your request seeks formal written advice. If more information is needed, the person assigned to prepare a response to your request will contact you shortly to advise you as to information needed. If your request is for informal assistance, we will answer it as quickly as we can. (See Commission Regulation 18329 (2 Cal. Code of Regs. Sec. 18329).)

You also should be aware that your letter and our response are public records which may be disclosed to the public upon receipt of a proper request for disclosure.

Very truly yours,

Kathryn E. Donovan
General Counsel

KED:plh